Supreme Court, U.S.
FILED
JAN 11 1989
JOSEPH F. SPANIOL, JR.
CLERK

NO. 88-1145

IN THE

# Supreme Court of the United States

THE DONG-A ILBO; JOONG-ANG ILBO; CHO-SUN ILBO; THE KOREA HERALD; THE KOREA TIMES, a/k/a HAN-KOOK ILBO; THE SAE GAE SHINBO, INC.

Petitioners

v.

CHANG-SIN LEE

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Jack G. McKay, Esquire
437 North Lee Street
Alexandria, Virginia 22314
(703) 836-7662

Counsel for Petitioners

*Brief Printing Specialist*, 1001 E. Main Street, Suite 210
Richmond, Virginia 23219, (804) 644-0700

113 pp

## QUESTION PRESENTED

Whether the Circuit Court of Appeals erred by not holding that the "blanket" official report privilege extended to the republication of the press release by agencies of the South Korean government; or, in the alternative, whether the Circuit Court of Appeals erred by not recognizing that the Appellants had the right to rely on the qualified fair report privilege, as was recognized by the dissenting judge.

PARTIES TO PROCEEDING

The Dong-A Ilbo; Joong-Ang Ilbo; Cho-Sun Ilbo; The Korea Herald; The Korea Times, a/k/a Han-Kook Ilbo; The Sae Gae Shinbo, Inc., Petitioners

Chang-Sin Lee, Respondent

Central Virginia Educational Television Corporation, Defendant at trial level and Appellant at Circuit Court of Appeals level

NOTE:

Reference Rule 28.1 - None of the Petitioners or parent companies are publicly held corporations.

The Dong-A Iblo is incorporated in the State of New York and has no subsidiary or affiliated companies. No parent company.

Joong-Ang Ilbo Daily News, Inc. is incorporated in the State of New York but wholly owned by its parent company in Korea by Joong-Ang Daily, Ltd., of Seoul, Korea

The Chosun Ilbo America, Inc. is a subsidiary corporation of the parent company in Korea by the name of Chosun Ilbo, Ltd., of Seoul, Korea, with no subsidiaries or affiliates

The Korea Herald is a subsidiary of the parent company in Korea, by the same company name: Korea Herald, Ltd. of Seoul, Korea.

The Korea Times is a sole proprietorship with no subsidiary or affiliates.

The Sae Gae Shinbo, Inc. is a subsidiary of the parent company One Up Enterprises of McLean, Virginia.

## TABLE OF CONTENTS


| | Page |
|---|---|
| Question Presented . . . . . | 1 |
| Parties to Proceedings . . . . . | 2 |
| Table of Contents. . . . . | 4 |
| Table of Citations . . . . . | 6 |
| Opinions . . . . . | 7 |
| Statement of Jurisdiction. . . . | 8 |
| Statement of the Case. . . . . | 9 |
| Argument | |
| The Circuit Court of Appeals erred by not holding that the "blanket" official report privilege extended to the republication of the press release by agencies of the South Korean government; or, in the alternative, the Circuit Court of Appeals erred by not recognizing that the Appellants had the right to rely on the qualified fair report privilege, as was recognized by the dissenting judge. . . | 12 |

CONTENTS (continued)


| | Page |
|---|---|
| Appendix A . . . . . | 20 |
| Appendix B . . . . . | 43 |
| Appendix C . . . . . | 108 |
| Certificate of Service . . . . | 111 |

## TABLE OF CITATIONS


Page

Elder v. Holland
208 Va. 15, 155 S.E.2d
369 (1967). . . . . 18

Gertz v. Robert Welsh, Inc.
418 U.S. 323 (1974) . . . . 16

Kroger Company v. Young
210 Va. 564, 172 S.E.2d
720 (1970). . . . . 18

Sanders v. Times-World Corp.
213 Va. 369, 192 S.E.2d
754 (1972). . . . . 17,18

Story v. Newspapers, Inc.
202 Va. 588, 590, 118 S.E.2d
668, 670 (1961) . . . . . 18

The Gazette v. Harris
229 Va. 2 (1985) . . . . . 16

Webb v. Times Publishing Co.
2 Q.B. 535, 3 W.L.R. 351,
2 All E.R. 789 (1960) . . . 13,15

## OPINIONS

The majority and dissenting opinions of the Court of Appeals are reported at 849 F.2d 876 (4th Cir. 1988) (Appendix "B"). The Order of the Court of Appeals denying en banc rehearing is not yet published (a copy of the Order is attached as Appendix "C"). The opinion of the United States District Court for the Eastern District of Virginia is unpublished (a copy is attached as Appendix "A").

## STATEMENT OF JURISDICTION

This is a Petition from a denial of a petition for rehearing from the United States Court of Appeals for the Fourth Circuit entered October 14, 1988.

The statutory provision granting the court jurisdiction is 28 U.S.C. Section 1254.

## STATEMENT OF THE CASE

In this libel case, Appellants, who were defendants at the trial level, appeal from the Circuit Court of Appeals denial on October 14, 1988 of their petition for a rehearing of its reversal (one judge dissenting) of the trial judge's summary judgment in their favor.

On September 9, 1985, two intelligence agencies of the South Korean government issued a sixty-two page "press release" announcing the disruption of two North Korean spy rings operating in the United States and West Germany. In Virginia, the defendants, six newspapers and one

public television station, reported the announcement, essentially by repeating the story as reported in the Korean press. Plaintiff Chang-Sin Lee, a South Korean citizen living in New York, was identified in the accounts as a North Korean agent, and subsequently filed this libel action.

Chang-Sin Lee immigrated to the United States in 1975 and is now a permanent resident alien. He graduated from Western Illinois University in 1984 and resides in New York City.

The press release was issued in South Korea by the National Security and Planning Agency and the Military Security Command, two South

Korean intelligence agencies. It described the disruption of a student-run, North Korean spy ring operating in the United States at Western Illinois University. The announcement was widely publicized in South Korea.

The defendants subsequently reported the announcement. All but one of the stories were in Korean, and all were targeted at the Korean-American community.

## ARGUMENT

**The Circuit Court of Appeals erred by not holding that the "blanket" official report privilege extended to the republication of the press release by agencies of the South Korean goverment; or, in the alternative, the Circuit Court of Appeals erred by not recognizing that the Appellants had the right to rely on the qualified fair report privilege, as was recognized by the dissenting judge.**

The parties to this case and the Circuit Court of Appeals recognized that the first pronge of the issue, which was whether the "blanket" official report privilege applied to reports based on acts of foreign governments was an issue of first impression. The petitioners

concede arguendo that the Circuit Court of Appeals and the dissenting judge properly decided this pronge of the issue against them; but, strongly contends that they were entitled to rely on the qualified fair report privilege, the position adopted by the dissenting judge.

As pointed out by the Circuit Court of Appeals, apparently the American courts have never considered whether the privilege applies to reports based on acts of foreign governments. However, both the Circuit Court of Appeals and the dissenting judge recognized that the issue had been addressed in Webb v. Times Publishing Co., 2 Q.B. 535, 3

W.L.R. 351, 2 All E. R. 789 (1960). Webb involved the issue of whether the defendant newspaper was privileged to report in England a Swiss judicial proceeding involving an English citizen; the Court refused to invoke the "blanket" official report privilege which would have existed had the Swiss Court been an English Court, but found the common-law qualified privilege existed because of the legitimate and proper interest of the English public in the proceeding.

The Circuit Court of Appeals' opinion establishes the rule for the Fourth Circuit that, not only is there no "blanket" privilege to report a press release of a foreign

government; but, contrary to Webb, there can never be a qualified privilege to report a press release of a foreign government regardless of the public interest involved. Under this rule, it is possible that a decision by an English court of great commercial importance in the United States could not be published in the United States without being defenseless to a libel suit.

As noted in the Circuit Court of Appeals' opinion the parties agreed that the applicable law is that of Virginia. If, however, the Circuit Court of Appeals had properly applied Virginia law, it would not have felt free to make a rule which

proscribed a report of official foreign government's actions from being tested to determine if the report was protected by the common-law qualified privilege.

The law is plain. Gertz v. Robert Welsh, Inc., 418 U.S. 323 (1974) ruled that, except for the public figure situation, the only constitutional constraint on the imposition of liability in defamation cases is that liability cannot be imposed without fault and that the States were otherwise free to set the standards for determining liability. After Gertz, the Virginia Supreme Court in The Gazette v. Harris, 229 Va. 2 (1985), with specific mention of its Gertz sanctioned freedom,

plainly held that common-law qualified privileges survive in Virginia.

In Sanders v. Times-World Corp., 213 Va. 369, 192 S.E. 2d 754 (1972), where statements in question were qualifiedly privileged, the Court held, as follows:

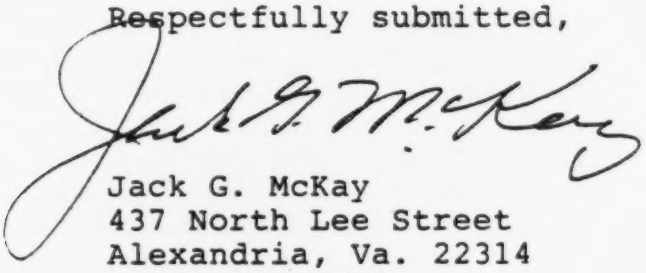
> "The events and happenings at Western Community College were matters of public or general concern. There is no evidence in this case from which the jury could conclude that the statements made by Harris to Chamberlain and the articles published by Times-World were made with actual malice or that they were made with reckless disregard to whether or not they were true.
>
> We therefore hold that the trial court did not err in entering summary judgment for the defendants.
>
> The judgment is
>
> Affirmed."
>
> (Id. at 373).

In Virginia, the qualified privilege arises from public policy considerations and attaches to the publication of articles covering matters of public or general concern. See Sanders v. Times-World Corp., supra. See also Kroger Company v. Young, 210 Va. 564, 172 S.E. 2d 720 (1970); Elder v. Holland, 208 Va. 15, 155 S.E.2d 369 (1967); and Story v. Newpapers, Inc., 202 Va. 588, 590, 118 S.E.2d 668, 670 (1961).

In this case, just as the events and happenings at Western Community College were matters of public or general concern in Sanders v. Time-World Corp., supra, the South Korean government press release describes the disruption of a

student-run, North Korean spying operation in the United States at Western Illinois University covered matters of public or general concern, particularly to the Korean American community. Under these circumstances, the Appellants' publication of the South Korean government's press release was privileged, and the Circuit Court of Appeals erred by not so holding.

Respectfully submitted,



Jack G. McKay
437 North Lee Street
Alexandria, Va. 22314
(703) 836-7662
Counsel for Petitioners

## APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

ALEXANDRIA DIVISION

| | | |
|---|---|---|
| CHANG-SIN LEE, | : | |
| Plaintiff | : | |
| vs. | : | CIVIL ACTION NO. 86-0958-A |
| THE DONG-A ILBO, et als. | : | |
| Defendants | : | |

## MEMORANDUM OPINION

IN SUPPORT OF ORDER OF
MARCH 23, 1987

This case came before the

Court on defendants[1] F.R. Civ. P. 56 motions for summary judgment.

The plaintiff filed a second amended complaint alleging that in September, 1985, defendants, The Don-A Ilbo, Joong-Ang Ilbo Daily News, Inc., The Korea Herald, Korea Times, Cho-Sun Ilbo, and Sae Gae Times published and circulated articles in the metropolitan Washington, D.C. area on an alleged student-run North Korean espionage ring in the United States. That on

---

1 The three motions for summary judgment consisted of one by each of the following defendants: Sae Gae Shinbo, Inc., the other five newspapers jointly, and Central Virginia Educational Television Corporation (CVETC).

September 12, 1985, WNVC-TV, owned by defendant, Central Virginia Educational Television Corporation, broadcast a report about the same news story in the same area. All defendants' articles or broadcast included a chart of individuals named as members of the espionage ring residing in the United States. Plaintiff (Chang-Sin Lee) alleges that the name (Lee Chang-Sin), inserted in one of the three boxes placed at the highest level of this chart, identified plaintiff in Korean[2] as "North Korean Agent in the U.S." and as an "Ex-employee of

---

2 Defendant, The Korea Herald, published its article in English.

the Overseas Korean Journal." Because defendants' publications and broadcast have allegedly injured plaintiff's reputation, he brought this action in libel seeking damages for certain defamatory statements made by defendants.

Plaintiff, Chang-Sin Lee, is a resident of New York. Defendants, The Don-A Ilbo, Korea Times, Joong-Ang Ilbo, Cho-Sun, The Sae Gae Shinbo, The Korea Herald, and Central Virginia Educational Television Corporation (WNVC-TV), are Virginia domiciliaries. This Court has jurisdiction pursuant to 28 U.S.C. § 1332.

Defendants contend that each article published and/or

broadcast by them was an accurate account of a September 9, 1985, Press Release (KBS news report) issued by the Korean National Security and Planning Agency ("NSPA") and the Korean Military Security Command ("MSC"), both intelligence agencies of the South Korean Government. Defendants assert that the "fair report" privilege, also referred to as the "official report" or "record privilege", should apply to all foreign government official reports.

Plaintiff argues that the "fair report" privilege should never be extended to republications of foreign government official reports. Plaintiff contends as well that there

is no public policy to be served by the dissemination of "official records" of foreign governments that may involve defamation.

The common law "record privilege" has long protected republication of defamatory statements stemming from governmental proceedings. Medico v. Time, Inc., 643 F.2d 134, 137 (3rd Cir.), cert. denied, 454 U.S. 836 (1981); see also Comment, Constitutional Privilege to Republish Defamation, 77 Colum. L. Rev. 1266, 1268-69 (1977).

The "fair report" privilege embedded in the common law of libel is set out in the Restatement (Second) of Torts § 611 (1977) as follows:

> (t)he publication of defamatory matter concerning another in a report of an official action or proceeding . . . is privileged if the report is accurate and complete or a fair abridgement of the occurrence reported.

Id.

One court acknowledged that "(s)ection 611 of the Restatement of Torts definitely expresses the prevailing, if not unanimous, weight of judicial authority." Lulay v. Peoria Journal-Star, Inc., 34 Ill.2d 112, 115, 214 N.E.2d 746, 748 (1966). The Medico court asserted also that there is an uprising trend towards recognition of a "constitutional privilege of fair report." Medico,

supra at 143.

This privilege "extends to the report of any official proceeding, or any action taken by any other officer of the government of the United States, or if any State or any of its subdivisions." Id. at comment (d) (emphasis added). The comments to § 611 stress that "(t)he filing of a report by an officer or

---

3 See generally Note, The Developing Privilege of Neutral Reportage, 69 Va. L. Rev. 853 (1983); Comment, Protecting the Public Debate: A Proposed Constitutional Privilege of Accurate Republication, 58 Tex. L. Rev. 623 (1980); Barnett, The Privilege of Defamation By Private Report of Public Official Proceedings, 31 Ore. L. Rev. 185 (1952).

agency of the government is an action bringing a reporting of the government report within the scope of the privilege." Id. (Emphasis added).

This privilege and/or conditional immunity applies to fair and accurate publications of official proceedings is an exception to the common law rule that one who repeats or republishes a defamation stated by another 'adopts' it as his own. Dameron v. Washington Magazine, Inc., 779 F.2d 736, 739 (D. D.C. 1985). (Emphasis added).

The Virginia Supreme Court has ruled that a fair and substantially correct publication of

a public record is privileged, that the inaccuracy of the record does not necessarily destroy the privilege, and that its status is not altered by the falsity of the statement in the record. Alexandria Gazette Corp. v. West, 198 Va. 154, 159-60, 93 S.E.2d 274, 279 (1956); see also, Williams v. WCAU-TV, 555 F. Supp. 198, 202 (E.D. Pa. 1983); Sciandra v. Lynett, 409 Pa. 595, 599, 187 A.2d 586, 589 (1963); Restatement (Second) of Torts § 611, Comment (f). Although verbatim accounts are unnecessary, the article must not depart substantially from the public record. Mills v. Kingsport Times-News, 475 F. Supp. 1005, 1011 (W.D. Va. 1979). In this case neither the plaintiff nor

defendants dispute the accuracy of defendants' news report and/or broadcast.

Virginia requires proof of common law malice, not mere negligence, to defeat a qualified privilege. The Gazette v. Harris, 229 Va. 1, 18, 325 S.E. 2d 713, 727, cert denied, _____U.S. _____, 105 S. Ct. 3513 (1985). In defamation actions, once the defendants have shown the existence of a "fair report" privilege, as they have done here, the burden shifts back to the plaintiff to demonstrate actual malice by the defendant toward the plaintiff. Id.; see also, Sciandra v. Lynnett, supra 409 Pa. at 599, 187

A.2d at 589. At the summary judgment stage in defamation actions, the United States Supreme Court now necessitates a showing of malice by clear and convincing preliminary evidence. Anderson v. Liberty Lobby, Inc., _____ U.S. _____, 91 L. Ed.2d 202 (1986).

Plaintiff fails to meet the heavy burden that defendants republished and/or rebroadcast the South Korean Press Release inaccurately or with malice toward the plaintiff. Plaintiff is unable to show that anyone attributed the news story to him or show that he is the individual referred to in the complained of article and/or broadcast. He has not produced

evidence of any malice of either defendant towards him or reckless or wanton disregard of either defendant towards him or reckless or wanton disregard of either defendant for the truth of the published and/or broadcast news story. The plaintiff argues that the privilege has never been extended and should never extend to publications of foreign official reports.

Since Virginia law is unquestionably as protective as § 611 of the Restatement (Second) of Torts' blanket privilege to reports of government actions, there is little doubt that if "the spy story" had been released in the United States by

a federal or state agency it would have been privileged. Section 611 and the official proceedings common law exception, as explained in Dameron, supra, should be given blanket application to a foreign government's actions for reasons given below.

Because of the United States' substantial involvement in international trade, markets, governments, security, etc., this 'fair report' privilege should be construed as having a broad scope as to the American press' and television's republication and/or rebroadcasting of foreign official news releases and/or proceedings.

The Medico court, supra, stressed that one of the crucial policies underlying S 611 is the public's right to be informed on significant matters, such as alleged organized criminal networks. Medico, supra, at 142. "(I)t is in the public interest that information be made available as to what takes place in public affairs, (so) a newspaper has the privilege to report the acts of the executive or administrative officials of government." Sciandra, supra 409 Pa. at 600, 187 A.2d at 587-88. "The basis of the privilege is the interest of the public in having information made available to it as to what occurs in official

proceedings and public meetings." Bufalino v. Associated Press, 692 F.2d 266, 271 (2d Cir. 1982), cert. denied, 462 U.S. 1111, 103 S. Ct. 2463, 77 L. Ed.2d 1340 (1983) (quoting Restatement (Second) of Torts § 611 comment (a)). (Emphasis added).

While there appears to be no reported cases dealing with this issue, the English Courts have addressed the issue on at least one occasion. In Webb v. Times Publishing Co., Ltd., 2 All Eng. 789 (1960), defendant newspaper had published a report of British subject Hume's trial in Switzerland. The publication stated that Hume had

admitted to murdering a Swiss citizen and to killing Stanley Setty in England because of jealousy. According to the report, when Hume was asked if he was married and had a child, he replied that he was but the father of the child was Stanley Setty. Plaintiff's action alleged that this meant that she had committed adultery with Setty and had given perjured evidence at a prior trial of Hume in England when she had denied ever having met Setty. Defendants contended that the qualified privilege attached to the report as a fair and accurate report of foreign judicial proceedings. The Webb court held that because the subject matter of defendants' report

was connected with the administration of justice in England, it was of legitimate and proper interest to English newspaper readers and was protected by a qualified privilege.

The privilege should encompass republication of foreign as well as domestic affairs. This privilege is one for the public's need to know what is happening in this country and in other nations, particularly where a news story has a significant nexus, as in this case, between persons located in the United States and involved with foreign governments. Here the subject matter of the news release by the Korean government was related to the

security interest of the United States. "The spy story" 's associating many of the student spies to Western Illinois University would be of public concern. Since the Korean government's news release was of legitimate and proper interest to the American public and the large Korean American community in particular, republication and/or rebroadcast of the news story should be protected by a qualified privilege. The need to know official actions and investigations by the South Korean government that affect the United States may be as great as government releases and actions of the United States government.

The plaintiff contends the privilege should not extend to foreign governments because those governments may not be as reliable as our own government in ascertaining the truth prior to making a release and may even engage in deception in their releases. However, the privilege assumes that government releases are based on official records and actions and they contain a degree of reliability over and above what might be stated or released by an individual. An official release by a foreign government also contains that higher degree of reliability. While other governments may not possess the democratic form of government and

commitment to informing its citizens in the same forthright manner as ours, it would not seem prudent to deny the privilege to their releases. With the tremendous advances in transportation, communications and trade our daily contacts around the world become more important. News from countries around the world become more important. News from countries around the world increasingly affects our national security, trade, price of the dollar, interest rates, and etc.

I find that the rationale and policy ramifications of the "fair report" privilege, set out in Dameron, Medico, and other cases,

pertain equally to the official pronouncements of foreign governments as to pronouncements of government entities in the United States. The privilege safeguards interests analogous to those guaranteed by the First Amendment, the right of persons anywhere in the United States to be informed of what governments in this nation and throughout the world are doing. The public has a right to be informed on important official government matters and the press must be allowed to publish or broadcast accounts of official government proceedings or reports.

An appropriate order shall issue.

/S/ CLAUDE M. HILTON
UNITED STATES DISTRICT JUDGE

Alexandria, Virginia

Date: April 16, 1986

## APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

---

No. 87-2578

---

Chang-Lee Lee,

Plaintiff-Appellant,

versus

The Dong-A Ilbo; Joong-Ang Ilbo; Cho-Sun Ilbo; The Korea Herald; Central Virginia Educational Television Corporation; The Sae Gae Shinbo, Inc.; The Korea Times, a/k/a Han-Kook Ilbo

Defendants-Appellees.

---

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Claude M. Hilton, District Judge. (CA 86-0958-A)

---

Argued: November 3, 1987
Decided: June 20, 1988

---

Before MURNAGHAN and ERVIN, Circuit Judges, and KAUFMAN, Senior United States District Judge for the District of Maryland, sitting by designation

---

Steven Marc Schneebaum (Jonathan N. Halpern; Patton, Boggs & Blow; Larry Garbert, International Human Rights Group on brief) for Appellant; Thomas John Cawley (Stephen M. Sayers; Hunton & Williams on brief); Jack G. McKay (Keh Soo Park on brief) for Appellees

---

ERVIN, Circuit Judge:

On September 9, 1985, two intelligence agencies of the South Korean government issued a sixty-two page "press release" announcing the disruption of two North Korean spy rings operating in the United States and West Germany. In Virginia, the defendants, six newspapers and one public television station, reported the announcement, essentially by repeating the story as reported in the Korean press. Plaintiff Chang-Sin Lee, a South Korean citizen living in New York, was identified in the accounts as a North Korean agent, and subsequently filed this libel action. The trial court granted summary judgment for the defendants

based on the official report exception to the general rule of republication liability. Lee appeals. We reverse and remand.

Chang-Sin Lee immigrated to the United States in 1975 and is now a permanent resident alien. He graduated from Western Illinois University in 1984 and resides in New York City.

The press release was issued in South Korea by the National Security and Planning Agency and the Military Security Command, two South Korean intelligence agencies. It described the disruption of a student-run, North Korean spy ring operating in the United States at

Western Illinois University. The announcement was widely publicized in South Korea.

The defendants subsequently reported the announcement, relying mainly on the accounts in the South Korean press. In fact, some of the defendants simply reprinted the story as it appeared in Korea, and the television station aired a rebroadcast from the Korean Broadcasting System. All but one of the stories were in Korean, and all were targeted at the Korean-American community.

The court below held that the official report privilege extends to the republication of all government reports, foreign and

domestic. To overcome the privilege, a plaintiff must show malice. Because Lee could not show malice, the court granted the defendants' motion for summary judgment.

The issue on appeal is both novel and straightforward. Does the official report privilege apply to reports based on the acts of foreign governments? The privilege is largely a creation of state defamation law. All parties agree that the applicable law is that of Virginia, where the statements were made. The Supreme Court has not found the privilege to be of constitutional dimension. See Medico v. Time, Inc., 643 F.2d 134, 143-45

(3d Cir. 1981). The Court, however, has recognized the existence of First Amendment considerations in the reporting of official actions. Id.; see Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978) (prohibiting criminal sanctions against publishers of information from confidential government proceedings); Cox Broadcasting v. Cohn, 420 U.S. 469 (1975) (prohibiting invasion of privacy action for publication of public record - the name of a deceased rape victim); Time, Inc. v. Pope, 401 U.S. 279 (1971) (holding based on lack of actual malice). In Pope, the Court noted that "perhaps the largest share of news concerning the doings of

government appears in the form of accounts of reports, speeches, press conferences, and the like." Pope, 401 U.S. at 286. At least one lower court has taken this concern and created a constitutional privilege in the reporting of newsworthy events. Edwards v. National Audubon Society, 556 F.2d 113, 120 (2d Cir.), cert. denied, 434 U.S. 1002 (1977).

Under the republication rule, one who repeats a defamatory statement is as liable as the original defamer. Medico, 643 F.2d at 137. The rule is based on the legal fiction that the republisher adopts the defamatory statement as his own. Id. The official or fair

report privilege is an exception to the rule of republication liability. It is a privilege to publish accounts of public proceedings or reports despite their defamatory nature. Id.; Alexandria Gazette Corp. v. West, 198 Va. 154, 159-60, 93 S.E. 2d 274, 279 (1956); Restatement (Second) of Torts[1] § 611. Apparently, American courts have never considered whether the privilege applies to reports based on

---

1 § 611. Report of Official Proceeding or Public Meeting. The publication of defamatory matter concerning another in a report of an official action or proceedings or of a meeting open to the public that deals with a matter of public concern is privileged if the report is accurate and complete or a fair abridgement of the occurrence reported.

the acts of foreign governments, although at least one English court has addressed the issue.[2]

The rationales underlying the privilege are particularly important because of this lack of prior law. The courts cite three policy rationales to support the

---

2 Webb v. Times Publishing Co., 2 Q.B. 535, 3 W.L.R. 352, 2 All E.R. 789 (1960). In Webb, the court made a limited extension of the privilege to protect the reporting of a Swiss judicial proceeding involving an English citizen. The court emphasized the nature of the activity, a judicial proceeding, which has far more reliability than the press release of an intelligence agency. Still, the court refused to invoke a blanket privilege for all foreign judicial proceedings. The court found the report to be privileged, however, based on the legitimate and proper interest the English public had in it.

official report privilege: agency, public supervision, and the public's right to know. See Medico, 643 F.2d at 140-42; Webb v. Times Publishing, Co., 2 Q.B. 535, 3 W.L.R. 352, 2 All E. R. 789 (1960). Under the agency rationale, a reporter acts as an agent for those who could inform themselves. Medico, 643 F.2d at 140-41. Here, the defendants reported summaries of the press release which was publicly available, at least in Korea.

The public supervision rationale is the idea that government should function openly with an eye toward its public responsibilities. Id. at 141. This rationale does not generally apply to the acts of

foreign governments who are not accountable to the American people. It is arguable, however, that South Korea's position as an ally and foreign aid recipient creates an American public supervision interest, that Americans need to know about the activities of such governments in order to supervise our own government.

The informational rationale or the public's right to know, focuses on the public's interest in important matters. Id. at 142. This is the most directly applicable rationale in the instant case, and the district court relied on it to apply the privilege. Americans in general, and Korean-Americans in

particular, have a strong interest in learning of the disruption of a spy ring in the United States by an American ally, South Korea. Espionage in the United States is clearly a legitimate public concern.

Standing alone, an analysis of these policy considerations supports the extension of the official report privilege to reports of foreign government activities. The information was publicly available, so the agency rationale applies; the activities of an ally and foreign aid recipient arguably create a supervisory interest; and foreign espionage in the United States is important to the public. Other considerations,

however, lead us not to extend the privilege in this case.

Three primary considerations weigh against extending the privilege. First, the rationales are not as persuasive in the context of foreign government activities. The informational rationale applies to all matters of importance no matter what their source, while the other rationales are less important when reports involve foreign governments. The agency rationale is weakened because the information here was available only in Korea. It was not readily available to those who chose to inform themselves, so the defendants were not acting as mere

agents by reporting it. The public supervision rationale applies only indirectly. The American public cannot influence the Korean government directly, and cannot influence many foreign governments at all.

Second, we usually extend the privilege because of the nature of the relationship we share with our own government. We are familiar with the workings of our government and consider it to be open and reliable. We can also hold our own government accountable for its actions. Foreign governments, like nongovernmental sources of information, are not necessarily familiar, open, reliable, or accountable. Therefore, we think

it unwise to provide a blanket privilege to those who report the activities of foreign government.

Third, extending the privilege in a piecemeal fashion would be extremely difficult. Establishing criteria based on openness and reliability would be hard enough, but objectively applying the criteria would be nearly impossible. Reasonable persons could differ as to which governments, besides our own, exhibit the openness and reliability that warrant an extension of the privilege. Because negligence and falsity are part of a plaintiff's burden under Virginia law, it is unnecessary to extend the

privilege any further. See Great Coastal Express, Inc. v. Ellington, 1230 Va. 142, 151, 334 S.E.2d 846, 852 (1985).

The dissent suggests making a case-by-case determination based on the importance of the information. There are several problems with this analysis.

First, the dissent places too much emphasis on the public's right to know and the importance of the defamatory information. While the "matters of public concern" are "at the heart of the First Amendment's protection," First Union National Bank of Boston v. Bellotti, 435 U.S. 765, 776 (1978), the State's interest in compensating private

individuals for injury to their reputation remain strong and legitimate and must be balanced against the First Amendment interest. See Dun & Bradstreet, Inc. v. Greenmoss Builders, 472 U.S. 749, 757 (1985). In Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), the Supreme Court held that the fact that expression concerned a public issue did not by itself entitle the libel defendant to the constitutional protections of New York Times. Id. at 343. The Court allowed the plaintiff, who was private figure, to recover actual damages so long as he was able to prove some fault on the part of the defendant, despite the

public nature of the defamatory statement. Id. at 347-50. Likewise, the fact that the defamatory expression concerned a public issue should not entitle the defendant to the common law protection of the official reports privilege.

Second, the dissent's analysis would result in a blanket application of the privilege. The mere fact that the report was officially issued by a foreign government would give that report an imprimatur of "public interest." The reports of a foreign government will almost always be of great importance to themselves, so the defendants were not acting as mere agents by reporting it. The public supervision

rationale applies only indirectly. The American public cannot influence the Korean government directly, and cannot influence many foreign governments at all.

Second, we usually extend the privilege because of the nature of the relationship we share with our own government. We are familiar with the workings of our government and consider it to be open and reliable. We can also hold our own government accountable for its actions. Foreign governments, like nongovernmental sources of information, are not necessarily familiar, open, reliable, or accountable. Therefore, we think it unwise to provide a blanket

privilege to those who report the activities of foreign governments.

Third, extending the privilege in a piecemeal fashion would be extremely difficult. Establishing criteria based on openness and reliability would be hard enough, but objectively applying the criteria would be nearly impossible. Reasonable persons could differ as to which governments, besides our own, exhibit the openness and reliability that warrant an extension of the privilege. Because negligence and falsity are part of a plaintiff's burden under Virginia law, it is unnecessary to extend the privilege any further. See Great Coastal Express, Inc. v. Ellington,

230 Va. 142, 151, 334 S.E. 2d 846, 852 (1985).

The dissent suggests making a case-by-case determination based on the importance of the information. There are several problems with this analysis.

FIrst, the dissent places too much emphasis on the public's right to know and the importance of the defamatory information. While the "matters of public concern" are "at the heart of the First Amendment's protection," First Union National Bank of Boston v. Bellotti, 435 U.S. 765, 776 (1978), the State's interest in compensating private individuals for injury to their

reputation remains strong and legitimate and must be balanced against the First Amendment interest. See Dun & Bradstreet, Inc. v. Greenmoss Builders, 472 U.S. 749, 757 (1985). In Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), the Supreme Court held that the fact that expression concerned a public issue did not by iteself entitle the libel defendant to the constitutional protections of New York Times. Id. at 343. The Court allowed the plaintiff, who was a private figure, to recover actual damages so long as he was able to prove some fault on the part of the defendant, despite the public nature of the defamatory statement. Id. at 347-50. Likewise,

the fact that the defamatory expression concerned a public issue should not entitle the defendant to the common law protection of the official reports privilege.

Second, the dissent's analysis would result in a blanket application of the privilege. The mere fact that the report was officially issued by a foreign government would give that report an imprimatur of "public interest." The reports of a foreign government will almost always be of great importance to some individual or some group in a heterogeneous society such as our own. In Webb, the court found that the information regarding the sexual

liaisons of a married woman was deemed to be worthy of "public interest" status because the subject matter dealt with testimony that was given in a domestic criminal trial. Such a standard would lead to an unlimited application of the privilege while affording no protection to the defamed private person.

Third, proper attribution in the republication by itself would not necessarily discourage false or undeserved reliance on a foreign government's report. While most readers would be skeptical of reports issued by governments that are openly hostile to the interests of the United States or of Americans, they

would be hard pressed to evaluate the reliability of reports issued by other allegedly "neutral" governments. we are unwilling to impute to most Americans sufficient knowledge with regard to the due process procedures of foreign courts or the accountability of foreign government agencies. Therefore, even with proper attribution, we are not willing to expand the applicability of the privilege.

We do acknowledge that not extending the privilege might have some chilling effect on newspapers and television stations. Without the privilege, they assume the risk that hastily gathered and promulgated

information is incorrect. Mills v. Kingsport Times-News, 475 F.Supp. 1005, 1011 (W.D. Va. 1979). Even mere negligence constitutionally can be the basis for liability when the defamed party is a private person, Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); The Gazette, Inc. v. Harris, 229 Va. 1, 15, 325 S.E.2d 713, 727 (1985), cert. denied sub nom., Fleming v. Moore, 472 U.S. 1032 (1985). We believe, however, that the burden on the press here in verifying reports from foreign governments does not sufficiently differ in nature or scope from the burden it bears when it receives information from domestic non-official sources. Because we find

that foreign governments are not necessarily more reliable than domestic non-official sources, we are not willing to enlarge the scope of the privilege to include information from such governments. Some countries may take advantage of our liberal First Amendment rights in order maliciously to defame or, carelessly and without adequate inquiry, excoriate private parties. In our opinion, therefore, the burden on the press is outweighed by the possible harm to the reputation of private persons.

Based on the preceding analysis of the offical report privilege, its underlying rationales,

and other considerations, we hold that the privilege does not apply to reports based on the press release issued by the South Korean government. So long as a plaintiff must prove falsity and negligence, it is unnecessary to extend the privilege any further. Summary judgment for the defendants based on the privilege was inappropriate, and the case is

REVERSED AND REMANDED.

KAUFMAN, SENIOR DISTRICT JUDGE, dissenting:

For the reasons stated by Judge Ervin, I agree with the majority that it is "unwise to provide a blanket privilege to those who report the activities of foreign governments." Ante at 7 (emphasis added). However, while the issue certainly is a close one, in my view the recognition rather than rejection of a qualified privilege would strike a mere appropriate balance between the need to protect an individual's reputation and the American public's need to have knowledge of the acts of foreign governments. Accordingly, I dissent from the majority's reversal

of the district court's grant of summary judgment. For the reasons stated in Part II of this opinion, I would, however, remand for further proceedings concerning plaintiff's claims against the seven defendants to determine whether proper attribution was made by each of them.

I.

The majority states that courts should not involve themselves in assessing the reliability and openness of the operations of a foreign government in order to determine whether, in a given case, the fair report privilege should apply. I agree that courts should always keep that problem in mind.

But that does not necessarily mean that courts are not fully capable of assessing the importance of a particular publication to a particular audience. By relying on that criterion, courts would be able to extend the privilege on a case-by-case basis as the need arises. As the current lack of case law in this area indicates, the issue of the fair report privilege in the foreign government context would hardly appear to arise often enough to make a case-by-case application unduly burdensome. Such an ad hoc approach is not new to defamation law; for example, application of the public figure doctrine presents "a question of law to be resolved by the court"

in each case in which the issue is present. Dameron v. Washington Magazine, Inc., 779 F.2d 736, 740-43 (D.C. Cir. 1985), cert. denied, 476 U.S. 1141 (1986). See also id. at 740-43.[1]

---

[1] In Gertz v. Welch, 418 U.S. 328 (1974), a private figure case, Justice Powell expressed concern about forcing state and federal judges to decide on an ad hoc basis which publications address issues of "general or public interest". Id. at 346; see also id. at 345-46. However, in Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986), another private figure case, Justice O'Connor focused on the importance of the information being published. See id. at 774-78. Also, in his plurality opinion in Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985), Justice Powell discussed whether the information was of public or private concern. See id. at 761-63. And, in Connick v. Myers, 461 U.S. 138 (1983), Justice White wrote: "Whether an employee's speech

As Judge Ervin has written, ante at 5, there are "three policy rationales [which] support the official report privilege: agency, public supervision, and the public's right to know." In a given context, one of those rationales may well be given more weight than the others.

---

footnote 1 continued:

addresses a matter of public concern must be determined by the content form and context of a given statement, as revealed by the whole record." Id. at 147-48. Connick involves free speech in the employment context, not defamation. However, Justice White's language in Connick was quoted with approval by Justice Powell in Dun & Bradstreet, 472 U.S. at 461, itself a defamation case. Thus, the Supreme Court has indicated that there may be occasions in the area of defamation law when a court needs to make determinations pursuant to a criterion of the type set forth in this dissent.

See Medico v. Time, Inc., 643 F.2d 134, 142 (3d Cir.), cert. denied, 454 U.S. 836 (1981); Note, Privilege to Republish Defamation, 64 Colum. L. Rev. 1102, 1102 (1964). In this case, as the majority opinion suggests, see ante at 7, the importance of the public supervision rationale does not loom too large. However, at least in the United States, the fact that citizens in one state have no direct ability to supervise state governmental activity in another state apparently does not affect the application of the official report privilege when the report, although issued by the government of the first state, is

republished in the second state. Also, as the success of many international human rights groups demonstrates, the importance of indirect supervision, i.e., public pressure, is a factor to be considered. With regard to the agency rationale, its importance per se is questionable whenever the government report is not available for public inspection, whether the government be our own or foreign. See, e.g., Medico, 643 F.2d at 140-41 & n.23 (discussing the inapplicability of the agency rationale in a case involving republishing of secret FBI report); see also Coleman v. Newark Morning Ledger Co., 29 N.J. 357, 149 A.2d

193, 205-06, 209 (1959) (concerning the republication of secret U.S. Senate proceeding).

Because the agency and public supervision rationales are less important in a case such as this one, it is the third factor, the public's right to know, which requires the most attention. The majority asserts that the privilege should not be extended to reports of foreign governments because those governments are "not necessarily familiar, open, reliable or accountable." Ante at 7. Presumably, the reports issued by those governments are not sufficiently trustworthy, and,

therefore, a greater risk of defamation inheres in publishing them. However, that risk alone should not outweigh the public's interest in the dissemination of that information. See Note, supra, at 1109, 1112, 1115. The majority seems to relate the extent of that risk to the conclusion that the American reading public will assume that the official reports of such unreliable governments are trustworthy. While that assumption may sometimes be well-grounded, it would seem quite likely that many American readers will often tend to discredit whatever a foreign government has to say when that government is perceived in this country as not treating its citizens

fairly by American standards. Also, as discussed in Part II infra, in a case in which the qualified privilege is otherwise available the requirement of proper attribution will inform the reader of the source of the information.

I agree with the majority that courts in the United States should try to avoid becoming involved in determining whether a given foreign government is open and reliable enough to warrant extending the privilege to the republication of a press release of that government. Such an inquiry could well implicate the credibility of the foreign government and its agencies. Cf.

Webb v. Times Publishing Co., Ltd., [1960] 2 Q.B. 535, 563. If a qualified privilege is recognized and the major criterion for its application depends upon the importance of the publication to the American reader, a court may have to walk a very thin line in order to avoid violating principles of comity. But, in any event, a complete refusal to recognize the privilege will not solve the problem entirely. For if the qualified privilege is held not available as a matter of law or, under the standards suggested by this dissent, is determined not to be applicable in a given case, then, as Judge Ervin has noted, ante at 7, under Virginia law the burden will be

on the plaintiff to prove falsity. That will require a given plaintiff not only to engage in pretrial discovery with regard to the issue of falsity, but, if trial is held, will cause that plaintiff to try to prove that the foreign government's report was false.[2] And, in a jury trial, that inquiry may be more difficult to control than an inquiry made by the court under the standard and procedure discussed in this dissent.

Webb v. Times Publishing Co., Ltd., [1960] 2 Q.B. 535 provides a framework for analyzing the public interest issue. Cynthia Webb, the

---

[2] See the discussion on the issue of burden of proof in the majority opinion, ante at 7.

plaintiff, was the former wife of Brian Hume. In 1950, Hume was tried in a British court for the murder of Stanley Setty. Webb testified on Hume's behalf at the trial, and in the course of so doing she stated that she had never met the murder victim. 2 Q.B. at 537. Hume was subsequently acquitted of the murder charge, although he pleaded guilty to a lesser offense. Id. at 538. In 1959, Hume was again put on trial for a different murder, this time in Switzerland. During the Swiss trial, Hume testified that, although he and Webb were married at the time of the first trial and had had a child, the father of that child was actually Stanley Setty, the murder victim

involved in the previous case. Id. at 537-38. An account of the Swiss trial, including the verbatim testimony concerning the relationship between Setty and Webb, was subsequently published in England by the defendant newspaper. Webb sued for defamation, claiming that a reader of the newspaper's account of the Swiss trial would conclude that she had not only committed adultery with Setty but also had perjured herself at the British trial by testifying that she had never met Setty before. Id. at 538-39.

In its defense, the defendant newspaper argued that a blanket common law official report

privilege protected its publication of the account of the Swiss trial, but that, in any event, a qualified privilege existed with respect to the particular facts in Webb. Id. at 553. After reviewing the five justifications commonly given for the privilege, see id. at 559-61,[3] Justice

---

[3] Those reasons are (1) the fact that court proceedings were open to the public; (2) that the administration of justice concerns all persons; (3) that the public should be educated about how justice is administered; (4) that even defamed persons may "be better off with fair and accurate reports than with rumors [sic] circulating," and (5) that the balancing of interests justified the extension of the privilege. Concluding that the first four of these reasons had very little force in the context of foreign judicial proceedings, see 2 Q.B. at 559-61, Justice Pearson emphasized the applicability of the fifth reason.

Pearson focused upon the need for the court to engage in a "balancing operation" in which the court "balanc[es] the advantages to the public of the reporting of judicial proceedings against the detriment to individuals of being incidentally defamed." Id. at 561. He noted that judicial proceedings in certain countries were not as fair or reliable as those in England, that such proceedings were sometimes subject to propagandist abuse by the governments of some countries, and that those two considerations increased the risk that incidental defamation would occur. Id. at 562. Justice Pearson concluded that, in terms of a blanket privilege, the

differences betwen foreign and British judicial proceedings were great enough that the risk of an individual being incidentally defamed outweighed the public benefit resulting from the reporting of that proceeding in England. Id. But, continued Justice Pearson, in some circumstances the British public interest might well justify the reporting of a foreign judicial proceeding and the application in such a case of the defense of privilege, despite the incidental risk of defamation. See id. at 563-

65.[4] In such circumstances, it is

---

[4] In so holding, the British court relied on the proposition that the status of the governmental body issuing the report was not conclusive, citing Perera v. Peiris, [1949] A.C. 1 (P.C.). Perera involved an appeal to the British Privy Council from the then-British colony of Ceylon concerning a report issued by the government of Ceylon. The report was based on testimony taken in camera by a government commission investigating an alleged bribery scandal within the Ceylon government, and was reprinted in the Ceylon Daily News. The plaintiff, who had testified in the in camera proceedings, was described in the report as "'completely lacking in frankness,'" [1949] A.C. at 17, and subsequently sued the newspaper for libel. The Privy Council noted that a qualified privilege of fair report existed under the applicable Roman-Dutch law, which was quite similar to British law in this area, id. at 19020, and concluded that the Ceylon public had a great interest in the contents set forth in the government's report. Id. at 21-22. As in this case, the press release in Perera referred to a non-public proceeding.

not the presence or absence of the foreign government's reliability which should control the applicability, vel non, of the privilege. See id. at 563; see also note 5, supra, Instead,

> [o]ne has to look for a legitimate and proper interest as contrasted with an interest which is due to idle curiosity or a desire for gossip. There is not necessarily anything wrong in newspapers publishing news items which appeal only to idle curiosity or the desire for gossip. But, if they do so, there is not in the subject-matter any such legitimate and proper interest as is needed to confer privilege for an incidental defamation that may be invovled.
>
> There is thus a test available for deciding whether the subject-matter is appropriate for conferring privilege. A report of the decision of the United States Supreme Court on an important question of

> commercial law has legitimate and proper interest. On the other hand, a report of a judicial proceeding wholly concerning with an alleged scandalous affair between Mrs. X and Mr. Y is unlikely to have such interest and is likely to appeal only to idle curiosity or a desire for gossip.

Webb, 2 Q.B. at 569-70 (emphasis added). In stating those extremes, Judge Pearson recognized that future cases might well involve subject matter of varying degrees of importance between such extremes. See id. at 570.

The majority opinion states that the burden of proving the falsity of the report's content and negligence in its publication, which Virginia law imposes upon a

plaintiff, adequately protects media defendants' First Amendment rights. Ante at 7. That may well be an important consideration in certain types of defamation situations. See Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 775-78 (1986). In a given case, both plaintiff and defendant may find it equally difficult to obtain access to the facts necessary to establish the truth or falsity of the information contained in the republished report of a foreign government. But in a case such as this, when the media

party is relatively small,[5] it may

---

[5] The following information about the media appellees would appear relevant. The public television station, WNVC-TV, is owned by appellee CVETC. CVETC is a non-profit, non-commercial public station based in Falls Church, Virginia, with an approximate viewship of less than 19,000 persons. See App. 81K, 127. WNVC-TV's multi-language programming serves many ethnic communities in the metropolitan Washington, D.C. area.

By contrast, the newspaper appellees specifically target their publications at the Korean-American public. The Sae Gae Times is a weekly English-language publication printed exclusively in the United States. The remaining appellees, although United States corporations, republish daily Korean language editions of major Korean daily newspapers for circulation in the United States. The Korean Herald is a two-person office and employs no reporters or editors. See App. 199. The record does not clearly indicate the size of the other appellees.

not have the financial or logistical wherewithal to confirm the accuracy of the information in the report.[6] Or, at the very least, it may not be able to do so with the speed necessary to make the publication of the report meaningful to its

---

[6] The record discloses that at least two of the appellees simply did not have the resources necessary to confirm the accuracy of the press release. See App. 200, 218. Appellee Sae Gae Times, which comes out weekly, tried to verify the story, but by the time of publication, was only able to contact one of the persons mentioned in the story. See App. 274-75. That appellee subseuqently did manage to get in touch with appellant and printed appellant's denial of the espionage charges. See App. 275.

readership.[7] In the heat of the moment, faced with prospect of potentially devastating lawsuits on the one hand and the difficulty of confirming a story's accuracy on the other, the media party may not find much comfort in the fact that, if the case goes to trial, the plaintiff may not be able to prove falsity.[8] On balance, media defendants, especially the smaller ones which are targeted

---

[7] The publisher of the Korean Times, which also republishes the Hankook Ilbo in the United States, testified during his deposition about the complaints received from the Hankook Ilbo's readership when stories from Korea are not reprinted as quickly as possible. App. 205.

[8] See ante at 8.

to specific audiences, may all too often decide not to publish.[9] As a result, certain segments of the American public--such as the Korean-American public in this case--will be deprived of access to information of

---

[9] By the terms of their publishing contracts, several of the appellees seemingly must either reprint verbatim a given edition of the Korean newspaper from which they receive their information, or cannot under the terms of the contract reprint anything at all. See App. 197, 205-06, 208-09, 220, 222. If by the terms of those contracts appellees may not eliminate articles the accuracy of which they cannot confirm, a choice not to reprint an official governmental report may of necessity prevent the republication of other nondefamatory information as well.

of great importance to them.[10] Under the circumstances, I conclude that this is the type of case in which a qualified privilege for the fair republication of an official report of a foreign government should exist and be applied, subject only to the reservations stated in Part II of this opinion.

---

[10] Indeed, the record reflects that this was the express opinion of at least two of the appellees. See App. 264, 294. Furthermore, the story seemingly was of special interest to those persons with connections to Western Illinois University, where appellant was a student during the time the espionage ring was allegedly active.

II.

There is a factual dispute as to whether some of the newspaper articles properly attributed the story to the two Korean agencies which issued the press release. To establish their right to rely on the qualified fair report privilege, appellees must establish (1) that the South Korean press release is an official report; (2) that it contains defamatory statements; (3) that the subject matter of the release is of public concern; (4) that an appellee's account of the press release is fair and accurate; and (5) that the media properly attributed the source of the report. See

Restatement (Second) of Torts S 611 [11] (1977).

All but one of these five requirements are met in this case.

---

[11] While the Restatement, as well as some cases, see, e.g., Lavin v. New York News, Inc., 757 F.2d 1416, 1420 (3d Cir. 1985), perhaps fuse together the separate requirements of accurate reporting and proper attribution, or apply balancing considerations, other cases suggest that each of these two requirements may stand on its own feet and be independent of the other, and that a defendant claiming the privilege must prevail separately as to each requirement. See Dameron, 779 F.2d at 739; see also, e.g., Curtis Publishing Co. v. Vaughan, 278 F.2d 23, 28-29 (D.C. Cir.), cert. denied, 364 U.S. 822 (1960); Hughes v. Washington Daily News Co., 193 F.2d 922, 923 (D.C. Cir. 1952) (citing state cases and terming issue "well-settled"). The latter view would appear preferable in the context of this case when one keeps in mind the closeness of the underlying issues involved.

First, because the press release was issued by two agencies of the South Korean government, it appears clear that the press release is an official report. See Medico, 643 F.2d at 139-40; Hughes v. Washington Daily News Co., 193 F.2d 922, 923 (D.C. Cir. 1952). Second, none of the parties appears to deny that the allegations contained in the release would be defamatory if proved at trial to be false. Third, for the reasons discussed by the majority and in Part I of this dissent, and as recognized by the district court, the subject matter of the report is of public concern. Fourth, appellant conceded in the district court that the various appellees' accounts of the

press release's contents constitute impartial and accurate summaries of the press release. App. 54-55, 61, 62; see Mills v. Kingsport-Times News, 475 F. Supp. 1005, 1011 (W.D. Va. 1979) (describing requirement of accurate summary under Virginia law). There is, however, an open issue, one apparently not specifically addressed by the district court: whether, with respect to each article, each of the appellees properly attributed the report to the Korean governmental agencies which issued it.

The issue of fair attribution is generally a question for the fact-finder; in the case at bar, that would be the jury, as

plaintiff has prayed a jury trial. See Lavin v. New York Times, Inc., 757 F.2d 1416, 1420 (3d Cir. 1985). The attribution requirement is not met, and therefore the privilege will not attach, if

> the report is written in such a manner that the average reader would be unlikely to understand the article (or the pertinent section thereof) to be a report on or summary of an official document or proceeding. It must be apparent either from specific attribution or from the overall context that the article is quoting, paraphrasing, or otherwise drawing upon official documents or proceedings.

Dameron, 779 F.2d at 739 (emphasis added).

The attribution requirement is especially important in the context of the republication of the

official reports of foreign governments because the proper attribution of such a report will tend to decrease the risk of incidental defamation. As Judge Mikva noted in Dameron:

> [If there is no proper attribution,] the reader is left with the impression that the conclusion is that of the article's author based on his own research--which may or may not have included government reports. Had the author attributed the report to its source, the reader would know that he was simply being informed of the [government agency's] view and could then evaluate the statement accordingly. The defamatory potential of an unattributed statement of what is apparently an accepted fact presents a far different situation.

779 F.2d at 740 (emphasis added).

The record discloses that appropriate attribution is present with respect to the CVETC news broadcast and the articles published by the Korea Herald and the Sae Gae Times.[12] As for the news stories

---

[12] The CVETC broadcast was given by an employee of the Korean Broadcasting System, the state-sponsored television station in South Korea. In the course of summarizing the press release, the announcer specifically referred to the National Security and Planning Agency and the Military Security Command by name, and stated that these agencies had issued a "special announcement" about the student spy ring and had "released" information pertaining to the incident. See App. 182-83 (translation of broadcast).

The Korean Herald, which prints its stories in English, published two related articles as well as an editorial. The articles, the basis for appellant's claim against this

carried by the Dong-A Ilbo, the Hankook Ilbo, the Joong-Ang Ilbo, the Cho-Sun Ilbo, and the Korea Times, the appellees appear to admit that

---

footnote 12 continued:

appellant's claim against this appellee, were on the same page and are clearly related. See App. 79-80. One of the articles begins: "The Agency for National Security Planning (NSP) and the [Military] Security Command Monday announced a crackdown . . . The announcement said . . ." The other article had a headnote beginning: "Following are summaries of activities by key members of the two espionage rings cracked down on by the [Korean government agencies]." See id.

Similarly, the Sae Gae Times published a synopsis of the press release as well as several related articles. The articles' source is specially labelled as a "Release by the National Security Planning Agency and the [Military] Security Command of Korea." App. 252.

these articles contained no specific attribution. See Appellees' Br. at 27. Accordingly, whether or not attribution is revealed by the overall context of the articles in question, see Dameron, 779 F.2d at 739, is a factual issue which not only has not been addressed by the district court but cannot, in any event, be determined by this court in the light of the record before us. Therefore remand to the district court for further proceedings as to the question of attribution concerning these four appellees[13]

---

[13] There are four rather than five appellees because the Korea Times is responsible for both its own publication and that of the Hankook Ilbo. See note 7, supra.

would be needed if the qualified privilege approach set forth in Part I of this dissent was subscribed to--as it is not--by the majority.[14]

---

[14] If there were such a remand and, if on remand, it were determined, either by the district court on a motion for summary judgment or by the jury at trial, that the remaining four appellees properly attributed the source of their articles, then the privilege would shield these four appellees from liability and would entitle them to judgment. That result would follow because, as the majority opinion states: "To overcome the [official report] privilege, a plaintiff must show malice." Ante at 3. In this case, appellant does not contend that appellees have acted with the common law malice necessary to destroy the privilege under Virginia law. See Gazette, Inc. v. Harris, 229 Va. 12, 325 S.E.2d 713, 727 (1985), cert. denied sub nom. Flemming v. Moore, 474 U.S. 1032 (1985) and Port Packet Corp. v. Lewis, 473 U.S. 905 (1985).

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

---

No. 87-2578

---

Chang-Sin Lee,

Plaintiff - Appellant,

v.

The Dong-A Ilbo, et al.

Defendants - Appellees.

---

On Petition for Rehearing with Suggestion for Rehearing In Banc

---

The appellees' petitions for rehearing and suggestions for

rehearing in banc and appellant's answer to the petitions were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestions for rehearing in banc, and

As the panel considered the petitions for rehearing and is of the opinion that they should be denied,

IT IS ORDERED that the petitions for rehearing and suggestions for rehearing in banc are denied.

Entered at the direction of Judge Ervin, with the concurrence of Judge Murnaghan and Judge Kaufman, United States District Judge sitting

by designation.

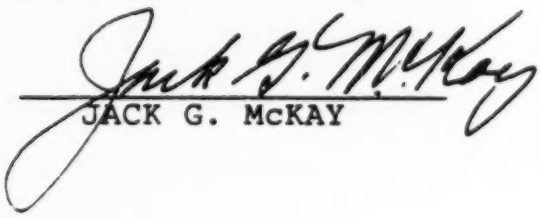
For the Court

/S/ JOHN M. GRAECEN
CLERK

## CERTIFICATE OF SERVICE

I hereby certify that I have this 11 day of January, 1989, served all parties required to be served and have mailed by first class mail with postage prepaid the required copies of the Petition for Writ of Certiorari to Steven M. Schneebaum, Esquire and Jonathan N. Halpern, Esquire, Patton, Boggs & Blow, 2550 M Street, N.W., Washington, D.C. 22037 and Larry Garber, Esquire, International Human Rights Law Group, 773 15th Street, N.W., Suite 100, Washington, D.C. 20005, Counsel for Respondent Chang-Sin Lee; and to Thomas J. Cawley, Esquire and Stephen M. Sayers,

Esquire, Hunton and Williams, 3050 Chain Bridge Road, P. O. Box 1147, Fairfax, Virginia 22030, Counsel for Appellant Central Virginia Educational Television Corporation. I further certify that I have hand delivered this Petition for Writ of Certiorari on January 11, 1989, to the Clerk's Office for the United States Supreme Court, and that such filing to my knowledge is timely.



JACK G. McKAY

Supreme Court, U.S.
FILED
FEB 17 1989
JOSEPH F. SPANIOL, JR.
CLERK

(3) (4)

Nos. 88-1145, 88-1163

In The

# Supreme Court Of The United States

October Term, 1988

The Dong-A Ilbo, *et al.*,
*and*
Central Virginia Educational
Television Corporation,

*Petitioners,*

v.

Chang-Sin Lee,

*Respondent.*

**ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT**

## PETITIONERS' SUPPLEMENTAL BRIEF OF RECENT DEVELOPMENTS AND REPLY TO RESPONDENT'S SUGGESTION OF MOOTNESS

Jack G. McKay
437 North Lee Street
Alexandria, Virginia 22314
(703) 836-7662

*Counsel of Record*
*For The Petitioners*
*The Dong-A Ilbo, Joong-Ang Ilbo, Cho-Sun Ilbo, The Korea Herald, The Korea Times and The Sae Gae Shinbo, Inc.*

Linda Lemmon Najjoum
Hunton & Williams
3050 Chain Bridge Road
P.O. Box 1147
Fairfax, Virginia 22030
(703) 352-2200

*Counsel of Record*
*For The Petitioner*
*Central Virginia Educational Television Corporation*

Balmar Legal Publishing Division, Washington, DC, 20005 (202) 682-9800

6 p

## TABLE OF AUTHORITIES

*Carroll v. President and Commissioners of Princess Anne*, 393 U.S. 175 (1968) . . . . . 2

Nos. 88-1145, 88-1163

In The

# Supreme Court Of The United States

October Term, 1988

The Dong-A Ilbo, *et al.*,
*and*
Central Virginia Educational
Television Corporation,

*Petitioners,*

v.

Chang-Sin Lee,

*Respondent.*

**ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT**

## PETITIONERS' SUPPLEMENTAL BRIEF OF RECENT DEVELOPMENTS AND REPLY TO RESPONDENT'S SUGGESTION OF MOOTNESS

### Preliminary Statement

The petitioners in this case wish to bring intervening matters to the Court's attention pursuant to Rule 35.5 of the United States Supreme Court. Since the two companion petitions for certiorari were filed on January 11, 1989 (No. 88-1145), and on January 12, 1989 (No. 88-1163), this case has been tried in the United States District Court for the Eastern District of Virginia. The case was tried on January 31, February 1 and 2, 1989. An adverse verdict was rendered against six of the seven petitioners. Such an adverse verdict demonstrates why the petition for certiorari in *The Dong-A Ilbo, et al. v. Chang-Sin Lee*, No. 88-1145, should be granted.

## Supplemental Statement Of Facts

In his Suggestion Of Mootness, the respondent Chang-Sin Lee ("Lee") correctly but incompletely recites the recent chronology of the trial of this case (Respondent's Suggestion Of Mootness at p.3). What Lee has failed to inform this Court is that although one of the petitioners, Central Virginia Educational Television Corporation ("CVETC"), had a verdict directed in its favor at the close of Lee's case-in-chief, the remaining six newspaper defendants were subjected to a jury verdict in the aggregate amount of $90,000.

Lee has informed this Court and CVETC, in his Suggestion Of Mootness, that he elects not to appeal the district court's decision to direct a verdict in CVETC's favor and that, therefore, CVETC's petition for certiorari becomes moot. As to the remaining petitioners, however, this Court's action could be dispositive on the issue of ultimate liability.

## This Case Is Not Moot

Although there are two petitions for certiorari in this case, both raising the same issue,[1] Lee has suggested that only one of these petitions may be moot. The petitioners concede that the authorities cited by Lee would support his argument, yet they invite the Court's attention to its decision in *Carroll v. President and Commissioners of Princess Anne*, 393 U.S. 175, 179 (1968), where a controversy was found not to have been mooted because "[t]he underlying question persists and is agitated by the continuing activities and program petitioners...." In this case, as the petition for certiorari filed by CVETC, and as the *amicus curiae* brief filed by Univision Holdings, Inc. ("Univision"), convincingly demonstrate, foreign language broadcasting is a firm fixture in the United States, a fixture which performs important heuristic functions for ethnic minorities living in this country, and which is

[1] The petitioners in No. 88-1145 specifically adopt and endorse all arguments made by CVETC in its petition for certiorari in No. 88-1163, as well as the compelling arguments made by the *amicus curiae*, Univision Holdings, Inc., in both No. 88-1145 and No. 88-1163. All parties consented to the filing of Univision Holdings, Inc.'s brief in both cases.

severely jeopardized by the Fourth Circuit's majority opinion. The underlying question, therefore, undoubtedly persists in this case.

Even if CVETC's petition for certiorari should be adjudged to be moot by reason of its success in the trial court and Lee's decision not to appeal, the petition filed by the remaining six newspaper petitioners presents a very real case and controversy. The implications of a libel judgment against media defendants who merely report the news, accurately and impartially, as the court below noted (*see* CVETC App. 16), should send a chilling shudder down the spine of the First Amendment. This is especially the case when the newspapers reported a foreign government's official announcements disinterestedly, fully, and without embellishment or endorsement, as in this case.

For the reasons stated in CVETC's petition for certiorari and Univision's *amicus curiae* brief, the Fourth Circuit's decision cannot withstand constitutional scrutiny. This case presents important, live and novel constitutional questions regarding the "freedom...of the press" guaranteed by the First Amendment, a freedom which is diminished if the Fourth Circuit's decision is permitted to stand unreviewed.

**Conclusion**

The Suggestion Of Mootness filed by Lee goes only to one of the petitions filed in this case and, even if well taken, cannot affect the vitality of the questions presented in No. 88-1145. The case is not moot and a writ of certiorari should be issued to review the judgment and opinion of the Fourth Circuit.

Respectfully Submitted,

Jack G. McKay
437 North Lee Street
Alexandria, Virginia 22314
(703) 836-7662

*Counsel of Record*
*for the Petitioners*
*The Dong-A Ilbo, Joong-Ang Ilbo, Cho-Sun Ilbo, The Korea Herald, The Korea Times and The Sae Gae Shinbo, Inc.*

Linda Lemmon Najjoum
HUNTON & WILLIAMS
3050 Chain Bridge Road
P.O. Box 1147
Fairfax, Virginia 22030
(703)352-2200

*Counsel of Record*
*for the Petitioner*
*Central Virginia Educational*
*Television Corporation*

Thomas J. Cawley
Stephen M. Sayers
HUNTON &WILLIAMS
3050 Chain Bridge Road
P.O. Box 1147
Fairfax, Virginia 22030
(703)352-2200

*Of Counsel*

**Certificate of Service**

We , Jack G. McKay and Linda Lemmon Najjoum, counsel of record for the Petitioners, and members of the bar of the Supreme Court of the United States, certify that three copies of this Petitioners' Supplemental Brief of Recent Developments and Reply to Respondent's Suggestion of Mootness, were mailed by certified mail, return receipt requested to Don A. Allen, Esq., Patton Boggs & Blow, 2550 M. Street, N.W., Washington, D.C. 20037, and Steven M. Schneebaum, Esq. and Jonathan N. Halpern, Esq., of the same firm and at the same address, counsel for the respondent Chang-Sin Lee; and to M. Therea Hupp, Esq., P.O. Box 419126, 2501 McGee Trafficway, Kansas City, Missouri 64141, counsel of record for the Amicus Curiae Univision Holdings, Inc.

Jack G. McKay
Linda Lemmon Najjoum
*Counsel of Record*
*For The Petitioners*